



TEXAS ETHICS COMMISSION



ETHICS ADVISORY OPINION NO. 556

June 19, 2020

ISSUE

Whether a registered lobbyist can be “present”¹ at an event via videoconference technology.
(AOR-635)

SUMMARY

No. To be “present” for purposes of Texas Government Code Sections 305.006(f) or 305.024(a), a registered lobbyist must share a physical location with the recipient of the expenditure.

FACTS

The requestor is a registered lobbyist who seeks clarification from the Commission regarding the meaning of the word “present” as it is used in Chapter 305 of the Texas Government Code. Specifically, Chapter 305 prohibits lobbyists from making certain expenditures to communicate directly with members of the legislative or executive branch, including expenditures on food or beverages, unless the lobbyist is “present at the event.” Tex. Gov’t Code §§ 305.006(f), 305.024(a).

The requestor asks whether a registered lobbyist may be “present” for purposes of Chapter 305 by meeting with legislators remotely via videoconferencing software such as Zoom or Apple FaceTime. The requestor asks us to assume that the lobbyist organizes, pays for, and attends the virtual meeting that includes food and/or beverages.

ANALYSIS

Section 305.006 of the Texas Government Code requires every registered lobbyist to file periodic reports of expenditures made to communicate directly with a member of the legislative or executive branch to influence legislation or administrative action. Tex. Gov’t Code §§ 305.006(a)-(b). These expenditures must be reported by category, including: “(1)

¹ Tex. Gov’t Code §§ 305.006(f), 305.024(a) (as amended by Chapters 92 (S.B. 1011) and 206 (H.B. 1508), Acts of the 79th Legislature, Regular Session, 2005).

transportation and lodging; (2) food and beverages; (3) entertainment; (4) gifts, other than awards and mementos; (5) awards and mementos; and (6) expenditures made for the attendance of members of the legislative or executive branch at political fund-raisers or charity events.” *Id.* § 305.006(b).

However, expenditures for certain categories—including food and beverage—are generally prohibited “unless the registrant is present at the event.” *Id.* § 305.006(f) (“An expenditure described by Subsection (b)(1), (2), (3), or (6) may not be made or accepted unless the registrant is present at the event.”); *see also Id.* § 305.024(a) (providing that a lobbyist may not offer, confer, or agree to confer to a member of the legislative or executive branch an expenditure described by Sections 305.006(1), (2), (3), or (6) unless present at the event).

All of our prior opinions discussing the presence requirement have assumed the physical presence of the registered lobbyist. *See, e.g.,* Tex. Ethics Comm’n Op. Nos. 113 (1993), 92 (1992), 89 (1992), and 4 (1992). Because we have not yet addressed the question, we look to other jurisdictions for guidance. The significant majority are in agreement; when a statute or rule requires a person to be “present,” it requires a physical presence,² unless there is an express exception that applies.³

For example, the Texas Open Meetings Act expressly allows members of governmental bodies to participate remotely in meetings “by videoconference call,” but only if the presiding officer is “physically present at one location of the meeting that is open to the public during the open portions of the meeting.” Tex. Gov’t Code § 551.127. Conversely, Chapter 305 of the Texas Government Code does not include any such express exceptions to the requirement that a lobbyist be present when making certain expenditures to communicate with members of the legislative and executive branches of government.

We understand the circumstances during this particular time in history are unique. Over the past several months, the Governor has declared a state of disaster due to the COVID-19 pandemic and has issued several emergency proclamations ordering Texas citizens to minimize social gatherings and to avoid restaurants, bars, and stores.

² *See, e.g., United States v. Navarro*, 169 F.3d 228, 236 (5th Cir. 1999), cert. denied 528 U.S. 845 (1999) (construing “present” as used in Federal Rule of Criminal Procedure 43 and holding that “the common-sense understanding of the definition is that a person must be in the same place as others in order to be present.”); *accord United States v. Williams*, 641 F.3d 758, 764-65 (6th Cir. 2011); *United States v. Torres-Palma*, 290 F.3d 1244, 1245-48 (10th Cir. 2002); *United States v. Lawrence*, 248 F.3d 300, 301, 303-04 (4th Cir. 2001); *United States v. Salim*, 690 F.3d 115, 122 (2nd Cir. 2012) (“every federal appellate court to have considered the question has held that a defendant’s right to be present requires physical presence and is not satisfied by participation through videoconference.”).

³ *See, e.g.,* Federal Rule of Civil Procedure 43(a), which expressly allows judges to “permit [presentation of] testimony in open court by contemporaneous transmission from a different location,” but only upon a showing of good cause.

However, in the absence of an express statutory exception to the common-sense meaning of presence, or a lawful executive order suspending the requirement that a lobbyist be present,⁴ it is our opinion that a lobbyist cannot satisfy Chapter 305's presence requirement using videoconference software.

However, food or beverage with a value of \$90 or less, which is delivered by mail or common contract carrier to a location other than the Capitol Complex, is a gift not subject to the presence requirement. Tex. Gov't Code §§ 305.0061(e-1), 305.006(b)(4); 1 Tex. Admin. Code § 18.31(a) (adjusting threshold from \$50 to \$90). An expenditure for such a gift is subject to the \$500 aggregate calendar year limit, rather than the allowance for an unlimited amount that may be spent on food or beverages that meets the presence requirement. *Id.* § 305.024(a).

⁴ Under Texas Government Code Section 418.016, the Governor has the authority to suspend any regulatory statute prescribing the procedures for conduct of state business if strict compliance would prevent, hinder, or delay necessary action in coping with a disaster. Governor Abbott has exercised that authority to suspend certain provisions of law during the pandemic, but he has not suspended any portion of Sections 305.006(f) or 305.024(a).